No. 251.
Br. of Birney, Edwards & Peter
for Appellees

FILED
APR 14 1900
JAMES H. McKENNEY
Clerk

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed April 14, 1900.

No. 251.

GEORGETTE A. CHAMBERLIN ET AL., APPELLANTS,

vs.

HORATIO BROWNING ET AL., APPELLEES.

Appeal from the Court of Appeals of the District of Columbia.

Motion to Dismiss and Brief for Appellees

A. A. BIRNEY,
JAS. S. EDWARDS,
ARTHUR PETER,
Solicitors for Appellees.

LAW REPORTER PRINT.

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 251.

GEORGETTE A. CHAMBERLIN ET AL., APPELLANTS,

vs.

HORATIO BROWNING ET AL., APPELLEES.

Appeal from the Court of Appeals of the District of Columbia.

Motion to Dismiss and Brief for Appellees.

Come now the appellees, Thomas T. Keane, Edward O. Whitford, Central National Bank, and Browning & Middleton, and move the court to dismiss the appeal herein, for that it does not appear from the record that the matter in dispute exceeds the sum of five thousand dollars.

A. A. BIRNEY,
JAMES S. EDWARDS,
ARTHUR PETER,
Solicitors for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

GEORGETTE A. CHAMBERLIN ET AL., *Appellants*,
vs.
HORATIO BROWNING ET AL., APPELLEES. } No. 251.

STATEMENT OF THE FACTS.

In 1888, John B. Scott being the owner, in fee simple, of a tract of land in Montgomery County, Maryland, conveyed the same to a certain Coughlan by whom it was at once reconveyed to the said Scott, for life, with a general power to sell, mortgage or devise the same, and after his death to his two daughters, Mary Elizabeth Scott and Margaret Adelia Scott, in fee simple. At the time of making said conveyances Scott was solvent and did not become indebted to any great extent for about eight years thereafter. The claims of the appellees and appellants did not come into existence until about seven years after the execution of said deeds. On April 24, 1896, the said Scott, a resident of the District of Columbia, made an assignment for the benefit of creditors (amongst whom were the appellants and appellees) to Horatio Browning, also a resident of the District, which was recorded among the land records of the District of Columbia on the next day, April 25, 1896. The deed of assignment purported to convey—

> "all and singular the real estate, goods, chattels, merchandise, effects, stocks, promissory notes, debts, claims, demands and property of him the said Scott, (except all legal exemptions which are hereby reserved by said Scott) *the same being fully described in Schedule 'A' hereto annexed.*"

The only reference in Schedule "A" to the Maryland property was:

> "*Estate for life* of said Scott in 25 acres of land in Montgomery County, State of Maryland, particularly described in deed recorded in Liber J. A. No. 11, folio 241 *et seq.*"

The appellants are creditors of the said Scott in various amounts, the largest claim being that of Georgette A. Chamberlin, executrix, who alleges that she holds Scott's notes to the extent of $24,110.96 upon which she has received payments reducing the same 16 per cent. (Rec. p. 5). The bill does not disclose the amount of the claims of all Scott's creditors who are entitled to come in under the deed assignment, but it appears from the affidavit of Henry K. Simpson, filed by the appellants (Rec. p. 10), that the same amount to $85,848.52, whereas the schedule annexed to the deed of assignment (Rec., pp. 15–17) discloses liabilities to the amount of $78,354.67.

On the 10th of May, 1896, the appellee Keane instituted non-resident attachment proceedings in the Circuit Court for Montgomery County, State of Maryland, against Scott and had the writ levied upon the land in question. On June 3, 1896, the said Browning obtained the deed of assignment from the Recorder of Deeds of the District of Columbia, where it had been awaiting its turn to be copied into the records, but the said Keane had long prior obtained a lien on the Maryland real estate for an amount exceeding the value of the life estate, which was all the deed of assignment purported to or could have conveyed, therefore, Browning though he filed the deed for record in Montgomery County on the 3d day of June, 1896, did not at this time nor has he since filed a bond as is made necessary by the Maryland Code (Article 16, Section 205. See brief hereto for terms of statute), before any title could pass to him as assignee, no interest which the deed pur-

ported to convey remaining for protection. On September 28, 1896, the appellee, Whitford, caused a writ of attachment to issue out of said Circuit Court of Montgomery County against said Scott and laid upon the lands in question. On September 29, 1896, the same proceedings were taken by the Central National Bank and the firm of Browning & Middleton, and on October 20, 1896, by Timothy D. Daly, and on — day of December, 1897, by the defendant Browning.

On November 11, 1896, Keane obtained judgments of condemnation of the land in the aggregate to the amount of $1,829.54 and in the following March the other appellees obtained similar judgments, Whitford for $535.80, Central National Bank for $3,049.69, Browning & Middleton for $2,217; Daly also obtained a judgment in March, 1897, for $1,173.83, and Browning in January, 1898, for $1,409.50.

On December 22, 1896, Keane filed a bill in equity against said Scott and daughters and said Coughlin in the Circuit Court for Montgomery County, alleging that said conveyances from Scott to Coughlin and from Coughlin to Scott were, upon their face, fraudulent as to subsequent creditors, of whom he was one, and praying that the same might be vacated, so as to leave the fee simple in Scott under the original deed to him. The defendants, Scott and daughters, answered said bill denying fraudulent intent; alleging that said Scott conveyed to his assignee his life estate, which was all the interest he had in said property; that the remainder in fee belonged to his said daughters, and praying that the bill might be dismissed. The case was heard on bill and answer, and the Circuit Court for Montgomery County, on July 16, 1897, granted the prayers of complainant and vacated the deeds as to him. An appeal was taken to the Court of Appeals of Maryland and on June 28, 1898, said decree was there affirmed. On July 23, 1898, writs of *fieri facias* were issued upon the aforesaid judgments of condemnation and

the property advertised for sale under the Keane judgment, sale to take place on August 27, 1898 (Rec., pp. 3, 4 and 5.)

On August 25, 1898, nearly two years after Keane's judgment of condemnation, the appellants, general creditors of Scott, filed their bill in equity in the Supreme Court of the District of Columbia against the appellees and against Browning in his own right and Daly setting forth these facts and further alleging that the defendants in said bill were residents of the District and had notice of said assignment and had received dividends at some indefinite time from the assignee—

> "that it was the intention of the said Scott, well known to the said Browning, to convey, as he states in the deed of assignment, all his property except legal exemptions, and the use of the term 'estate for life' in reference to the Maryland land was an attempt to describe all the interest which he had therein and *had he known* that the court would hold that the deed under which he held was constructively fraudulent in its limitations and vested in him the fee simple, he would have so listed it in his schedule."

The bill then sets up various matters connected with the operation of the assignment in Washington and property situated here, whereby they seek special and singular relief against the defendant Browning, and then pray for an accounting with Browning, discovery from Scott, the removal of Browning and the appointment of a new assignee, that Scott be required to execute a new deed more specifically conveying the fee simple to said Maryland property, that the appellees and the other defendants therein be restrained from in any manner proceeding to enforce their said judgments of condemnation, and from doing any act to prevent the property in Maryland from being distributed to all creditors alike; and on hearing, said injunction be made perpetual; or, if this could not be done, that the appellees be directed to bring into court for equal distribution amongst all the creditors the money derived from said land.

A restraining order enjoining the defendants to said bill including the appellees, as prayed therein, was passed *ex parte* by the court on the day of the filing of the said bill. On the succeeding day the appellant Keane, filed an affidavit denying any participation in the assignment or any acceptance of a dividend thereunder, and moved the discharge of the restraining order; the court modified the same so as to permit a sale of the property, but continued it in all other respects (Rec., pp. 8 and 9). The land was sold for $8,500, insufficient to pay the judgments of the appellees in full, and leaving nothing for the other judgment creditors, whose judgments were subsequent in point of time, viz., Browning and Daly. The appellees separately demurred to the bill of complaint on the following grounds, viz: (1) Said bill is multifarious; (2) Complainants showed no such interest in the property involved as entitled them to file said bill and seek the relief prayed; (3) Because the court is without jurisdiction to proceed as prayed; (4) Because of complainant's *laches* apparent upon the face of said bill; (5) For numerous other reasons apparent upon the face of said bill.

The Supreme Court of the District of Columbia overruled said demurrers and continued the injunction, from which decree the appellees herein, viz.: Keane, Whitford, Central National Bank and the firm of Browning & Middleton, being, by reason of the price the property brought, the only defendants to said bill interested in obtaining a reversal thereof, prosecuted a special appeal to the Court of Appeals of the District of Columbia. The last named court, on the 12th of January, 1899, reversed said decree and remanded the cause, with directions to sustain the demurrer, dissolve the injunction and dismiss the bill as to the appellants there, Keane, Central National Bank, Whitford and the partnership of Browning & Middleton, and for further proceedings against the defendant Browning, as assignee, not inconsistent with the opinion of said court. Thereafter, on the 31st day of January, 1899, the Supreme Court of the

District of Columbia, in obedience to the mandate of the Court of Appeals, entered a decree in conformity therewith, from which decree the appellants appealed to the Court of Appeals of the District of Columbia, which affirmed the last mentioned decree of the Supreme Court of the District of Columbia, from which decree of affirmance the appellants prosecuted this appeal to the Supreme Court of the United States.

Brief Upon Motion to Dismiss.

This is a suit brought by several creditors, claiming under a deed of assignment for the benefit of creditors, to restrain the appellee, Keane, from enforcing several judgments, aggregating $1,829.54, the appellee Whitford from enforcing a separate judgment for $538.30, the appellee The Central National Bank from enforcing a separate judgment for $3,049 69, and the appellee Browning & Middleton from enforcing a separate judgment for $2,217.00 against a tract of land in Maryland which, it is claimed, passed or was intended to pass under the assignment. The judgments of the several appellees sought to be enjoined are entirely separate and distinct from each other, being rendered in separate and distinct actions. The bill prays that if the injunction can not be granted, that the appellees may be directed to bring into court for distribution among all the creditors any moneys they may realize out of said land by the means of their separate judgments. The enjoining of these judgments or the decreeing that the appellees bring in the respective amounts they may receive thereunder, is the only relief prayed against appellees. To obtain this relief the appellants rely upon the alleged facts that appellees are each residents of the District of Columbia and that each separately accepted a benefit, viz., a dividend, under said assignment, and is thereby estopped

from proceeding against property in Maryland which it is imagined that the deed of assignment attempted to and did convey, that they had the same attorney in Maryland, and that the other appellees knew that if Keane succeeded in his suit there against Scott, it would be advantageous to all of them. From these allegations an attempt is made to claim that the judgment of each appellee is the judgment of the other, and that the appellants may combine all the judgments in order to raise the amount in dispute to over $5,000. It is evident, however, that—

> "The recovery, if any, must be against each appellee separately for the amount he may personally be found accountable."

Though each appellee has substantially the same grounds of defense and the questions in each instance are substantially the same, yet the appellees' grounds of suit against each depend upon a separate residence and a separate act, in accepting a dividend, which may be true as to some and not as to others. Basing their claim upon these unconnected acts of the appellees, the appellants seek to deprive them of their separate property rights, viz.: distinct judgments, no appellee being interested to the amount of $5,000. To do this the defendants must be separately enjoined or decreed to separately bring into court the amounts of their respective judgments.

> "It is well settled that neither co-defendants nor co-plaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal."
>
> Henderson *vs.* Wadsworth, 115 U. S. 176.

> "Distinct judgments in favor of or against distinct parties cannot be joined to give this court jurisdiction."
>
> Adams *vs.* Crittenden, 106 U. S. 577.

The last cited case is directly in point, precisely similar as to the facts and effectually disposes of this question. See also:

Schwed *vs.* Smith, 106 U. S. 188.
Ex parte B. & O. R. R., 106 U. S. 576.
Hawley *vs.* Fairbanks, 108 U. S. 548.
Tupper *vs.* Wise, 110 U. S. 399.
Oliver *vs.* Alexander, 6 Peters 143.
Paving Co. *vs.* Mulford, 17 How. 3.

> "Upon the same principle neither party can appeal from a decree upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if the sum for which each is alleged or found to be liable is less than the jurisdictional amount."
>
> Gibson *vs.* Shufeldt, 122 U. S. 37.

It is obvious that the matter in dispute between the appellants and the appellees are these judgments and not the land. The appellees never claimed or had any title to the land. Their rights were to their judgments which happened to be a lien upon the land in favor of each to the extent of his separate judgment and, so far as the appellees are concerned, the effort is to deprive each of his judgment, and not to deprive each or all of them of the land, the title which they have never had nor claimed.

> "In Farmers' Bank of Alexandria *vs.* Hoof, 7 Pet. 168, this court dismissed an appeal from a decree of the Circuit Court for the District of Columbia dismissing a bill to have land worth more than $1,000 sold for the payment of a debt less than $1,000, which was the limit of the jurisdiction, Chief Justice Marshall saying: 'The real matter in controversy is the debt claimed in the bill and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit.'
>
> "In Ross *vs.* Prentiss, 3 How. 771, land worth

more, and mortgaged for more than $2,000 was about to be sold on execution for a debt of a less sum, and a bill by the mortgagee to stay the sale was dismissed. He appealed to this court, and insisted that its jurisdiction depended on the value of the property, and the amount of his interest therein, and that he might lose the whole benefit of his mortgage by a forced sale on execution. But the appeal was dismissed, Chief Justice Taney saying: 'The only matter in controversy between the parties is the amount claimed on execution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend on the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and as that amount is in this case below two thousand dollars, the appeal must be dismissed.'"

Gibson *vs.* Shufeldt, 122 U. S. 29.

It is respectfully submitted that the matter in dispute does not exceed $5,000, and the appeal should be dismissed.

A. A. BIRNEY.
JAS. S. EDWARDS.
ARTHUR PETER.

BRIEF UPON THE MERITS.

POINT I.

The land in question is situated in Maryland and the construction and effect of the deed of assignment as regards the same, must be determined by the laws of that State. Under the laws of Maryland the deed of assignment, under its express terms, did not attempt to pass more than the life estate in the property, by its terms could not have passed more, and the assignee could not by any proceedings have obtained more. The appellants are simple contract creditors, and any rights which they have in the land in question must be derived from the deed of assignment. Therefore, in any possible view of the case, they were never interested in more than the life estate which was practically worthless.

The only property within the comprehension of this case is the land situated in Montgomery County, Maryland.

> "The operation of the deed of assignment as a conveyance of its title must depend solely upon the laws of Maryland; for it is an unquestionable principle of law, here and everywhere, that the title and disposition of real property are exclusively subject to the laws of the State wherein it lies, which can alone prescribe the mode whereby the title can be passed from one person to another."
>
> Opinion of the Court of Appeals in this case, p. 27 of the Record.

> "As to the assignment, under the Statute of Connecticut, it is very clear that Powell's title to real estate within this commonwealth could not pass thereby. The title and disposition of real estate is

exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass."

Osborn *vs.* Adams, 18 Pick. 247.
McCormick *vs.* Sullivant, 10 Wheat. 192, 202.
United States *vs.* Fox, 94 U. S. 315, 320.
Robertson *vs.* Pickrell, 109 U. S. 608, 611.
Schley *vs.* Pullman Car Co., 120 U. S. 575, 580.
Langdon *vs.* Sherwood, 124 U. S. 74, 81.
Arndt *vs.* Griggs, 134 U. S. 316, 321.

That the rule laid down above is applicable to deed of assignment for the benefit of creditors, see—

Loving *vs.* Pairo, 10 Iowa, 282.
Gardiner *vs.* Bank, 95 Ill. 298, 304.
Jenks *vs.* Ludden, 34 Minn. 482, 486.
Thompkins *vs.* Adams, 41 Kan. 38, 48.

Cases cited on behalf of the appellants go no further than to hold that, where an assignment for the benefit of creditors has been made in one State, it will pass the title to personal and sometimes to real property in another State, as against citizens of the former, when the deed of assignment, *in its form and execution, is in substantive compliance with the laws of the latter State regulating conveyances of the title to such property, and does not expressly contravene the laws and established public policy of the State where the property is situated,* but conflicts only in some of its administrative features with the local law regulating the administration of such trusts for the benefit of creditors.

Substantially opinion of the court below, p. 27 of the Record.

The general terms in the body of the deed of assignment in question are restricted by a reference for a more full and particular description to the schedule annexed. The schedule expressly restricts the conveyance to a life estate

(Rec., pp. 13, 14). Under the laws of Maryland, by which we have seen the effect of the deed must in this instance be determined the schedule governs and the courts of that State would hold that the assignment only conveyed a life estate to the assignee.

Mims *vs.* Armstrong, 31 Md. 96.

Moreover, Scott, the assignor, only had a life estate to convey to the assignee, the powers conferred upon him by the deed from Coughlin constituted no estate and a court of equity would not have compelled him to exercise those powers at the instance of creditors for their benefit. The Court of Appeals of Maryland, in construing the deed under which the assignor held at the time of the assignment, said that he only had a life estate, and that the powers did not enlarge it to a fee simple.

> "It may also be assumed that notwithstanding the power of disposition reserved, Scott would only take a *life estate*, for when property is given *expressly for life* with a power of disposition superadded, the first taker only has a life estate with the power annexed. The distinction between such a gift and one to a person *generally* or *indefinitely* with a power of disposition (a distinction that is said to be slight but perfectly well established) is recognized in Benesch *vs.* Clark, 49 Md. 497; Foos *vs.* Scarf, 55 Md. 301, and other cases in this State, and we therefore assume that unless the powers are executed, if the deed is valid, Scott only has a life estate and that estate is liable for his debts. But a life estate is of little value as compared with the absolute ownership in fee," etc.
>
> Scott *vs.* Keane, 87 Md. 709.

That a court of chancery will not compel the donee of a power, general or special, to exercise it in favor of his creditors when there has been no attempt on his part to exercise it, has been too frequently settled to need citation of authority. See, however—

Sugden on Powers, 3d Amer. Ed., p. 26, Vol. 2.

In no part of the deed of assignment does the assignor attempt to exercise the powers, which powers he must have exercised before he could defeat the fee simple of his daughters in the land.

A power can be validly exercised by deed in only three ways:

> "First, by a direct reference to the power; secondly, by a disposition of the subject of the power when the person making the disposition possesses a mere naked power of appointment, coupled with no interest; and, thirdly, when the instrument relied on as an execution of the powers would be inoperative unless aided by the power."
>
> Farlow *vs.* Farlow, 83 Md. 122.

That Scott did not by the deed of assignment exercise the powers reserved to him is settled by Ridgely *vs.* Cross, 83 Md. 161.

Even if Scott had attempted to exercise in the deed of assignment the powers he possessed the fee simple could not have passed to the assignee since Scott had no right to exercise the powers for that purpose. By the terms of the deed creating the powers Scott could *sell*, mortgage or devise the property; but a conveyance by deed of assignment is not a mortgage nor a will, and does not amount to sale.

As we have seen, the Maryland courts held that Scott only had a life estate in the property, but that deeds under which he held *were, as to the appellees*, voidable for implied fraud. They were not void as between Scott and his daughters, and Scott could not have complained of his own fraud and obtained from a court of chancery a decree annulling the deeds so as to obtain for himself the fee simple. And if Scott could not, neither could his assignee, who is not a *bona fide* purchaser for value and has no greater rights than his assignor.

> "There is no statute in Maryland, as there is in some of the States, which has extended the powers

> of the assignee in this respect, and under the common law of assignments the assignee stands in the place of the assignor, and can assert no claim to property which the assignor might not. The assignment does not, therefore, carry with it to the trustee the title to property which the assignor has previously transferred in fraud of his creditors. In such case the creditors are left to pursue their remedies with respect to such property just as if no assignment had ever been made."
>
> Luchmeyer *vs.* Seltz, 61 Md. 324.

It thus appears that even in the absence of other objections the assignee in the deed of assignment under which appellants claim could not in any event have obtained more than the life estate in the land. Had he gone to the Maryland courts they would have refused him more because they would have said:

> "The assignor had only a life estate, but if he had more he only conveyed to you a life estate; you have no greater rights than he, and therefore can not be permitted to have the deeds from Scott to Coughlin and from Coughlin to Scott set aside so as to obtain the fee simple."

The bill in this case seeks to enjoin the sale of any interest in the land in question, and to compel the appellees to bring in all the proceeds of sale, whereas it is obvious that in any view of the case the appellees are only interested to the extent of a life estate therein, and that life estate the Maryland Court of Appeals said was of little value.

The appellants claim, however, the fee simple in the Maryland land passed to the assignee by virtue of an act of Congress contained in Vol. 27, U. S. Statutes at Large, page 474, relating to assignments in the District of Columbia, which requires the assignor to attach to the assignment an inventory of the property assigned, and then provides:

> "But such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other *property belonging to the debtor* at the time of making the assignment, and comprehended within the general terms of the same."

It is clear, from the authorities heretofore cited in this brief, that this statute can not determine the construction and effect that a Maryland court will give to the assignment in its relation to real estate in Maryland.

If the law were otherwise and the Maryland courts were bound to let the act of Congress affect the devolution of real property in Maryland, still the appellants' claim to the fee simple would not be substantiated. The Act of Congress refers to property belonging to the assignor, not to powers of which he is the donee and the execution of which for their benefit the creditors could not compel. But as we have seen, under the Maryland court's construction of the deed from Coughlin to Scott, which it is not contended the Act of Congress could affect, Scott only had a life estate—the fee simple did not *belong* to him. Again, though the Act of Congress makes the general terms of the assignment and not the inventory determine what property passes thereunder, yet in this case the general terms of the assignment indicated no intention to exercise the powers without which Scott could not defeat the fee simple of his daughters.

Again, the statute does not operate upon property previously conveyed in fraud of one's creditors, since such property does not *belong* to the assignor.

The appellants practically admit in their bill that the assignment does not convey, nor attempt to convey, more than a life estate, but seek to evade this by saying it was Scott's intention to convey all his property, and that this was known to one of the appellees (how can this affect the others?) and that had Scott known that the courts would hold

that he had a simple fee, he would have conveyed that instead of a life estate. It appears from the decision of the Maryland Court of Appeals that Scott and his daughters swore in their answer to Keane's bill that Scott intended to convey only a life estate by the deed of assignment. No court would permit the appellants to set up a parol intention opposed to the language of the deed, nor could they do so without making Scott's daughters parties, since in so doing the latter's interest would be defeated. But supposing the law to be otherwise, he did what they say he intended—he conveyed all of his estate, viz., a life estate, as we have seen, a power in no estate; nor did the Maryland courts hold that he had a fee simple, but a life estate; and it was not Scott, but his creditors, who could reach the fee simple by having the deeds set aside.

If the laws of the District of Columbia are to govern then the deeds from Scott to Coughlin and from Coughlin to Scott made nothing more than proper provisions for Scott's family, were not fraudulent as regards the appellees or appellants, all of whose claims accrued long subsequent to the execution of the deeds in question and the rights of Scott's daughters to the fee simple would be upheld in the courts of the District against the assignee, the appellees or the appellants.

Jones *vs.* Clifton, 101 U. S. 225.

From the decision in the last cited case, it is clear that powers reserved to Scott by which *he* might defeat his daughters' fee simple would not pass to the assignee.

In view of the cases last cited the Maryland court when at the suit of the appellees it annulled the deeds from Scott to Coughlin and from Coughlin to Scott, gave to the appellees the fee simple of the daughters in which the assignee or appellants have no interest.

POINT II.

An express statute in Maryland prevents the appellants from having any interest in land in question under the deed of assignment. It would be unconstitutional to act in defiance thereof.

Keane's attachment was levied before the deed was recorded in Maryland and all the attachments were levied before a bond was filed by the assignee. Until this bond is filed no title to the property passes to the assignee, *a fortiori* to those who claim under him.

Code of Md., Art. 16, Sec. 205 et seq.

> Sec. 205: "Every trustee, to whom any estate, real, personal, or mixed, shall be limited or conveyed for the benefit of creditors, or to be sold for any other purpose, shall file with the clerk of the court, in which the deed or instrument creating the trust may be recorded, a bond in such penalty as the clerk may prescribe, being as nearly as can be ascertained, double the amount of the trust estate, and with sureties to be approved by the clerk, conditioned for the faithful performance of the trust, by the deed or other instrument reposed in such trustee, which bond shall be recorded in the office of the said clerk; but when the sale is to be on a contingency, no bond need be given until the contingency happens; *no title shall pass to any trustee as aforesaid*, until such bond shall be filed and approved as aforesaid; and no sale made by any such trustee without such bond, shall be valid, or pass any title to such property or estate."
>
> Sec. 206: "When upon an investigation of the circumstances of the case, the circuit court of the county, or Circuit Court or Superior Court of Baltimore City, shall be satisfied that it would be improper to require a bond to be given for double the amount of the property placed in their hands, or made subject to the disposition of said trustee, the

court may prescribe the amount of the bond to be given by such trustee.

Sec. 207: "If any trustee shall fail or refuse to give such bond for the space of three months after the deed or instrument creating the trust is deposited with the clerk to be recorded, the clerk shall give notice thereof to the court, of which he is clerk, or to the judge thereof, who, upon consideration of the circumstances and upon reasonable notice to the trustee, and such of the parties interested as may conveniently be served therewith, as the court or judge shall prescribe, shall proceed to appoint another trustee in lieu of the trustee who shall have failed or refused.

Sec. 208: "Upon the trustee, so appointed by the court or judge, giving bond as before directed, the whole trust estate shall vest in him, subject to the provisions of the trust deed, or other instrument creating the trust, and the same power may be exercised by the court or judge from time to time until a trustee shall be appointed and give bond.

Sec. 209: "It shall be the duty of the trustee within six months from the period of his giving bond, to make report upon oath to the circuit court for the county or Circuit Court of Baltimore City, of the whole amount of the trust estate and the disposition made of the same; and any sale of leasehold or fee simple property made by such trustee, before taking effect, shall be reported to and ratified by said court.

Sec. 210: "If any trustee shall fail to make report to the court, as required by the preceeding section, the clerk shall issue a summons commanding him to appear before court at the next ensuing term to make such report, and if the summons is returned served, and the trustee shall fail to appear and report, an attachment shall issue to compel an appearance upon which similar proceedings shall be had as in other cases."

The provisions of the above act are imperative and apply to a deed of assignment for the benefit of creditors where

the *assignors* are *non-residents* of the State so far as the deed relates to real property in the State. And if in such case, subsequent to the deed of assignment being recorded in the State but before a bond is given as required by the act, parties, even though they may be *non-residents*, have attachments levied upon the land situated in this State they can not be deprived of their liens by the assignees subsequently filing the bond or by any other act.

White *vs.* Bank, 80 Md. 1.

The act is imperative.

Stiefel *vs.* Cohen, 73 Md. 410.

It requires the sale of lands to be made under the supervision of the Maryland courts.

Moore *vs.* Title Co., 82 Md. 292.

It enables the Maryland courts to remove the assignee.

Thus no title to the property in question has ever passed by the instrument under which the appellants' claim, and this positive act of the Maryland legislature relating to real property in that State must be given effect by the courts of the District of Columbia. The latter cannot dispose of the property in conflict therewith, for such conduct would be in violation of the Constitutional provision requiring full faith and credit to be given the public acts of another State. This would be so even if the property were personal.

The case of Green *vs.* Van Buskirk, 5 Wall. 307 seems to settle this question.

Bates executed a chattel mortgage in the State of New York to secure Van Buskirk on some safes in Illinois. Green attached the same in Illinois before the mortgage was there recorded. All the parties were residents of New York.

By the laws of Illinois no title passed until the mortgage was recorded there. No appearance was entered in the attachment proceedings by Bates *and Van Buskirk was not a*

party. Green obtained a judgment of condemnation and sold the property. Van Buskirk thereupon sued Green in New York, under the laws of which the title had passed to the former, to recover the proceeds, contending that the New York laws governed, and Green could not go outside the State to avoid them. The New York courts so held, but this court reversed the State court and determined that the laws of Illinois governed, and failure to give them effect would be unconstitutional.

And the court in that case says:

> "There is no little conflict of authority on the general question as to how far the transfer of personal property by *assignment* or sale, made in the country of the domicil of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of commentaries on the conflict of law has discussed the subject wtih his usual exhaustive research. And it may be conceded that as a question of comity the weight of his authority is in favor of the proposition that such transfers will, generally, be respected by the courts of the country where the property is located, though the mode of transfer may be different from that prescribed by the local law. *But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where the property is situated, or the established policy of its laws prescribe to its courts a different rule.* 'The learned commentator, already referred to, in speaking of the law of Louisiana, which gives paramount title to an attaching creditor over a transfer made in another State, which is the domicil of the owner of the property, says: "No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal or real, within its territorial limits.' The court then holds that to fail to give effect to such an act would be unconstitutional."
>
> Green *vs.* Van Buskirk, 5 Wallace, 307.

Butler, Hayden & Co., residents of Massachusetts, through F., of New York, on March 11, 1885, attached, in the last named State, certain *credits* of Bird, who was at that time insolvent and also a resident of Massachusetts. In April, 1885, proceedings in insolvency were taken against Bird in Massachusetts, and on June 1, 1885, assignees in insolvency were appointed. On June 19, 1885, *and before judgment in the attachment suit*, the assignees filed a bill in equity in Massachusetts against Butler, Hayden & Co., alleging that their conduct in bringing the attachment proceedings was contrary to the policy of the Massachusetts laws, which, being residents, they were bound to respect, and prayed that they be enjoined from further proceedings in the attachment suit. The Massachusetts court sustained the bill, and granted the injunction, whereupon a writ of error was sued out in this court on the ground that the action of the Massachusetts court was in violation of Article 4, Sections 1 and 2 of the Constitution. This court, however, sustained the State court in its right to enjoin residents in such cases, *provided* (1) The complainant's claim was not opposedto the policy or law of the sister State where the property was situated; and provided: (2) The proceedings in the sister State had not reached judgment and became, in the language of the Constitution, a judicial proceeding.

In so holding this court made use of the following language:

> "Whether the law of the common domicil of two or more litigants determines their title to property in another territory, so that an attaching creditor, whose domicil is that of the assignor, can not set up against the assignment the law of the foreign country where the property is actually situated, has been much discussed. . . . *It is certain that the law of the common domicil can not overcome such registry and other positive laws of the other country as are distinctly politic and coercive. If a State provides that no title shall pass to property within its borders, except on cer-*

tain conditions, such provision can not be overriden by the law of any other State which parties domiciled there may be held to have adopted.

. . . . . .

"Nor was there any law or policy of the State of New York contravened by the insolvent proceedings in question, or in itself inimical to the title of the assignee."

Cole *vs.* Cunningham, 133 U. S. 107.

As we have seen, in Maryland there is an *imperative* law that no title shall pass to the assignee until bond has been filed which stands today inimical to any title under the assignment.

POINT III.

The Appellees Having Obtained Judgments in Maryland it Would be Unconstitutional for this Court to Deprive them Thereof.

All of the appellees had obtained judgments of condemnation in Maryland from one to two years prior to the filing of the bill in this case. The courts of Maryland have dealt with property in question and by judicial proceedings given to the extent of their respective judgments a title in the proceeds to the appellees. For any other jurisdiction to deprive the appellees of their rights under these judgments would be failing to give "full faith and credit to the judicial proceedings of another State," and therefore unconstitutional.

> "That complainants were not parties to that proceeding, or that Scott may not even have been brought before the court in person, are matters of no consequence in so far as the effect of that judgment comes under consideration in this case. Inasmuch as it was a valid judgment of condemnation, subjecting the attached property to the payment of the demand found to exist for that purpose, pronounced by a court of unquestioned jurisdiction in the prem-

> ises, it would have the same effect if pleaded in defense to an action here that it has in Maryland. Green *vs.* Van Buskirk, 7 Wall. 139, 148: S. C., 5 Wall. 307, 312: Cole *vs.* Cunningham, 133 U. S. 107, 133. For stronger reasons, if possible, no court of another jurisdiction should undertake to thwart its regular execution in the interest of the party thereto, by executing coercion upon him when he may happen to be within its power."
>
> Opinion of the court below.

"Attachment laws," to use the words of Chancellor Kent—

> "are legal modes of acquiring title to property by operation of law, and if a title acquired under the attachment laws of a State and which is valid there, is not to be held valid in every other State, it were better that those laws were abolished, for they would prove to be but a snare and a delusion."
>
> Quoted from Green *vs.* Van Buskirk, 5 Wall. 307.

In Green *vs.* Van Buskirk, *supra*, all of the interested parties were citizens and residents of New York, where the chattel mortgage was made by Bates to Van Buskirk. Green attached the personal property, so conveyed, in the courts of Illinois, where it was then situated, procured its condemnation and sale, and appropriated the proceeds. Van Buskirk sued him in New York to recover the value of the converted property. Van Buskirk was not a party to the attachment suit, nor was Bates by personal service. It was held, nevertheless, that the judgment so obtained, having that effect in Illinois, was a bar to the action, and for the New York courts not to so hold was unconstitutional.

In the later case of Cole *vs.* Cunningham, *supra*, wherein an injunction, issued by a State court of Massachusetts to restrain a citizen of that State from the prosecution of an attachment suit in the State of New York, was upheld, it

was said, after quoting with approval from Green *vs.* Van Buskirk, that—

> "It will be perceived that it was manifestly inadmissible to hold that after Van Buskirk had permitted Green to go to judgment in a proceeding *in rem*, which appropriated the property as belonging to Bates, he could then get judgment against Green for the conversion of what had been so adjudged to him, an adjudication which Van Buskirk had voluntarily declined to litigate in the proper forum, and had not sought in his own State to prevent. It was a contest between two individuals claiming the same property, and that property capable of an actual *situs*, and actually situated in Illinois. The attachment was not only levied in accordance with the laws of Illinois, but the laws of that State affirmatively invalidated the instrument under which Van Buskirk claimed. Clearly, then, the law of the domicil of Van Buskirk, Green and Bates could not overcome such registry and other positive laws of Illinois as were distinctly coercive."

(Concluding:)

> "*In the case at bar the attachment suits* HAVE NOT GONE TO JUDGMENT, *and the assignees in insolvency have proceeded with due diligence against these creditors, citizens of Massachusetts, who are seeking to evade the laws of their own State;* NOR IS THERE ANYTHING IN THE LAW OR POLICY OF NEW YORK OPPOSED TO THE LAW OR POLICY OF MASSACHUSETTS IN THE PREMISES."

It was contended by counsel in Cole *vs.* Cunningham, *supra*, that the decision in Green *vs.* Van Buskirk was conclusive of the case then being argued; but the majority of the court held that because in the Cunningham case there had been no judgment, viz., judicial proceeding, Green *vs.* Van Buskirk did not apply; but it is admitted in the opinion of the majority that had there been a judgment, no other State could interfere by injunction and no suit could be maintained to distribute the proceeds in opposition to such judgment. That the case of Cole *vs.* Cunningham

turned on the question of whether there had been a judgment or not is shown clearly by the opinion of Judges Miller, Field and Harlan, dissenting, where they state that they can see no difference between the right to interfere after an attachment levied, but before judgment, and the right to interfere after judgment; in either instance it would be unconstitutional. In the present case we come within the views of both the majority and the minority, since all the appellees had obtained judgments.

> "The proceeding in this case is subtantially a suit in equity to recover and subject the proceeds of land situated in Maryland, that has been condemed and sold under a judgment of a court of that State, to a demand acquired under an instrument which, by the law of Maryland, had no force or effect as a conveyance of title; and, therefore, comes directly within the rule enounced in Green *vs.* Buskirk, and approved in Cole *vs.* Cunningham.
>
> The proper place for the complainants to maintain their claim was in the courts of Maryland which had jurisdiction of the subject matter, and whose laws exclusively governed its disposition.
>
> They, however, not only kept out of the litigation in Maryland of which they had knowledge in time to join before the judgment of condemnation was rendered, but also stood by and permitted the defendant Keane to undertake the labor and expense of the subsequent litigation with Scott, and his daughters, who claimed the remainder upon the termination of his life estate, that resulted in annulling the conveyance, under which they claimed, as in fraud of creditors, and without which result the condemnation judgment would have been of little or no value.
>
> See Scott *vs.* Keane, Maryland Court of Appeals, April term, 1898."
>
> Opinion of the court below.

In Lawrence *vs.* Batcheleer, 131 Mass. 504, quoted with approval in Cole *vs.* Cunningham, the court holds that no right exists to recover back the proceeds after judgment and

sale, and shows that the leading case of Dehon *vs.* Foster, 4 Allen (Mass.) 545, where an injunction was granted before judgment, proceeded upon the theory that it must be done then, since the right to so do would be lost after judgment.

> "But the case of Dehon *vs.* Foster proceeded on the ground that there was no adequate remedy at law for the wrong complained of; that the title to the funds attached, which the defendants, *if permitted to proceed with their action to judgment and levy of execution on the funds attached, would obtain, must be recognized as a valid one by our laws.*"

The case of Bartlett *vs.* Kinney, 147 U. S. 480, relied on by appellants, is really authority in favor of appellees; the court sustained the right of the assignee because (1) the property was personal; (2) the Idaho statute did not relate to foreign assignments; (3) the attaching creditor had not obtained a judgment of condemnation.

POINT IV.

Whether or not one State Court Could Enjoin Parties From Proceeding in Another State Court, it is Clear that no United States Court can do so, even before Judgment.

> "The writ of injunction shall not be granted in any court of the United States to stay proceedings in any court of any State, except in bankruptcy proceedings."
>
> R. S. U. S., Sec. 720.

The aforegoing statute applies as well to injunctions against *parties* who are proceeding in a State court as it does to an injunction against the court itself.

> Dial *vs.* Reynolds, 96 U. S. 340.
> Whitney *vs.* Wilder, 54 Fed. Rep. 554.

This statute applies by reason of its general terms to the Supreme Court of the District of Columbia, which is necessarily a court of the United States.

United States *vs.* Mills, 11 App. D. C. 504.

The object of this act was to prevent unseemly conflict between courts of different jurisdictions which certainly makes it strongly applicable in the present instance.

To prevent such conflict it has always received a liberal interpretation.

Diggs *vs.* Walcott, 4 Cranch, 179.
Peck *vs.* Jeuness, 7 How. 612.
Watson *vs.* Jones, 13 Wall. 679.
Haines *vs.* Carpenter, 91 U. S. 254.
Dial *vs.* Reynolds, 96 U. S. 348.
In re Sawyer, 124 U. S. 200.
Dillon *vs.* K. C. Ry. Co., 43 Fed. R. 545.

The statute may be said to be declaratory and in extension of the established principle of comity between courts, through the operation of which when the jurisdiction of one court and the right of a party to prosecute his suit has attached, another court will not undertake to arrest the proceedings.

Peck *vs.* Jeuness, 7 How. 624.

POINT V.

Laches.

Appellees' judgments were rendered from one to two years before the bill in this case was filed. Such unexplained delay in what now amounts to an attempt to obtain the benefit of appellees' expenditures and hard fought struggles, constitutes unwarranted neglect and *laches* which

would be fatal, even were the court dealing with judgments of the courts of the District of Columbia.

See—

Morris *vs.* Edwards, 62 Tex. 206.
Bateman *vs.* Willoe, 1 Sch. & Lefr. 204.
Barber *vs.* Elkins, 1 Johns Ch. 465.
Stilwell *vs.* Carpenter, 59 N. Y. 414.

"The jurisdiction of equity to stay proceedings at law after judgment and recovery is of ancient origin, and, although now established beyond dispute, it was formerly the cause of frequent and violent contests between chancellors and common law judges. . . . The jurisdiction, although well established, is not regarded as a favorite one with courts of equity. A bill seeking relief of this nature is scrutinized with extreme jealousy, and the grounds upon which the interference will be allowed are confessedly somewhat narrow and restricted. It will not suffice to show that injustice has been done by the judgment against which relief is sought, *but it must also appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must show a clear case of diligence to entitle himself to an injunction.*"

High on Injunctions, 3d Ed., Vol. 1, Sections 112, 113.

POINT VII.

Multifariousness.

The bill is multifarious. The appellees' rights are unconnected; and they should not be compelled, without their desire, to litigate in the same suit.

No Estoppel.

Appellees cannot support their bill upon the principle of estoppel. Their allegations of fact to constitute the same are too vague and indefinite. But even if this were not so

there is no estoppel. If the appellants have by their action prevented themselves from disputing the deed of assignment, this estoppel obviously does not operate to prevent them from taking steps to obtain that which the deed of assignment does not purport to convey, viz., the fee simple, or (2), what it could not convey by reason of the prior fraudulent deeds, viz., the fee simple; or (3), from obtaining, so far as the appellants and the assignee are concerned, what, if Jones *vs.* Clifton, 101 U. S., p. 225, be upheld, belongs to the daughters beyond the attack of any creditor or assignee for the benefit of creditors. To prevent the appellants obtaining that which the assignee could not get would be "dog in manger" policy, which the daughters of Scott would undoubtedly have viewed with pleasure.

But, again, no act of the appellees can operate to prevent this court from giving constitutional effect (1) to the statutes of Maryland, (2) to the Maryland judgments: nor from giving effect to R. S. U. S., Sec. 720, nor to *laches* of the appellants. Even if estopped as to property in the District of Columbia, this is not so as to land in Maryland.

Moore *vs.* Church, 70 Iowa, 208.

The defendant Browning's position does not differ from those creditors who attached subsequently to Keane. He placed the deed of assignment at once upon record in the District of Columbia. It was impossible to record it in two places at the same time unless executed in duplicate, which the assignor did not do, nor would it occur to a layman to suggest the same. The appellants do not charge, nor could they truthfully do so, that the failure to record the deed in Maryland at once was by reason of any fraudulent design of Browning; they say *he neglected to do so.*

When he received the deed back from the Recorder in the District of Columbia, Keane had already laid attachments on the Maryland property for more than sufficient to

consume the life estate, all that the assignment attempts to convey or could convey.

In reference to the fee simple, Browning occupied no position of trust; it was simply a question which creditor could first obtain a lien on it; and the firm of Browning & Middleton occupied, as regards the fee simple, the same relation as any other creditor.

But, again, the act of the Maryland Legislature, Code, Art. 16, Sec. 205 et seq., or the judgment of Browning & Middleton, will prevent this court from giving to the appellants any interest in the property, or any right to question the judgment. Added to this is their *laches* and R. S. U. S. Sec. 720. If Browning & Middleton's judgment were invalidated, it would not benefit the appellants, since the judgment of Daly, set forth in the bill of complaint, would then come in to consume the entire remaining fund.

Conclusion.

To the points heretofore suggested must be added the difficulty of this court obtaining the funds if it determined to distribute them, for it is hardly conceivable that the Maryland court will permit them to be brought here in opposition to their laws and judicial proceedings, and thus we are confronted with the danger of unseemly conflict. If the appellants have rights, let them go to Maryland, where the funds are, and ask relief. If they have no rights which that State will recognize, this court will hardly lend itself to aid them in opposition to the Maryland laws, and it is submitted that if the appeal is not dismissed the decree of the lower court should be affirmed.

A. A. BIRNEY,
JAS. S. EDWARDS,
ARTHUR PETER,
Solicitors for Appellees.